Merrell M. Williams; Boy's Restaurant, Inc.; Girl's Restaurant; Jumbo's d/b/a Farm Boy Restaurant; Farm Boy Restaurants Nos. 2 and 3 and Hotel Employees and Restaurant Employees International Union, Local 703, AFL-CIO. Case 31-CA-10172

November 26, 1982

DECISION AND ORDER

By Members Fanning, Jenkins, and Zimmerman

On June 2, 1982, Administrative Law Judge Frederick C. Herzog issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, and hereby orders that the Respondent, Merrell M. Williams; Boy's Restaurant, Inc.; Girl's Restaurant; Jumbo's d/b/a Farm Boy Restaurant; and Farm Boy Restaurants Nos. 2 and 3; Santa Maria, Arroyo Grande, Pismo Beach, and San Luis Obispo, California, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT refuse to bargain in good faith with Hotel Employees and Restaurant Employees International Union, Local 703,

AFL-CIO, by repudiating our tentative agreements upon the subjects of meal credits and cost-of-living increases in wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to form, join, or assist, or be represented by the abovenamed Union.

WE WILL, upon request, bargain collectively with the above-named Union as the exclusive bargaining representative of our employees with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached with said Union, embody such understanding in a signed agreement. The unit of our employees for whom we will negotiate with the aforesaid Union is as follows:

All chefs, dinner cooks, second cooks, barbecue or broiler cooks, fry cooks, cook's assistants, pantrymen or women, bakers, waiters, waitresses, dishwashers, janitors, yardmen, carhops, cashier-hostesses, busboys, busgirls, bartenders, cocktail waitresses, and bar boys at our restaurants in Santa Maria, Arroyo Grande, Pismo Beach, and San Luis Obispo, California.

MERRELL M. WILLIAMS; BOY'S RESTAURANT, INC.; GIRL'S RESTAURANT; JUMBO'S D/B/A FARM BOY RESTAURANTS RANT; FARM BOY RESTAURANTS NOS. 2 AND 3

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: Based upon a charge filed on July 10, 1980, by Hotel Employees and Restaurant Employees International Union, Local 703, AFL-CIO (herein called the Union),1 against Merrell M. Williams, as an individual and as owner or part-owner of Boy's Restaurant, Inc., Girl's Restaurant, Jumbo's d/b/a Farm Boy Restaurant; and Farm Boy Restaurants Nos. 2 and 3 (herein collectively referred to as Respondent), the complaint herein was issued by the Acting Regional Director for Region 31 of the National Labor Relations Board on March 11, 1981. together with a notice of hearing for November 3, 1981. The complaint alleges, in general, that Respondent violated Section 8(a)(1) and (5) of the Act on March 9, 1980, by its repudiation of certain tentative agreements reached during the course of collective-bargaining sessions between the Union and Respondent in late February 1980.

265 NLRB No. 70

¹ The name of the Union appears as amended at the hearing.

This case was heard before me at Los Angeles, California, on November 3, 16, 17, and 18, 1981. All parties appeared and were afforded the right to participate, to examine and cross-examine witnesses, and to introduce evidence in support of their positions. Moreover, the parties were afforded the right to file briefs and make oral argument at the conclusion of the hearing. Counsel for the General Counsel argued orally on the record and chose not to file a brief. Briefs were filed on behalf of the Charging Party and Respondent.

Based upon the record² as compiled, plus my consideration of the briefs filed by the Union and Respondent, I make the following:

FINDINGS OF FACTS

I. THE BUSINESS OF RESPONDENT

Boy's, Girl's, Jumbo's, and Farm Boy Restaurants Nos. 2 and 3 are respectively alleged by the complaint to have operated restaurants in the area of Santa Maria, Arroyo Grande, Pismo Beach, and San Luis Obispo, and to have purchased and received goods or services valued in excess of \$5,000 annually from sellers or suppliers located within the State of California which received such goods in substantially the same form directly from outside the State of California, and to have had gross revenues in excess of \$500,000 annually. It is further alleged that Boy's, Girl's, Jumbo's, and Farm Boy Restaurants Nos. 2 and 3 are affiliated business enterprises, constituting a single integrated business enterprise and a single employer within the meaning of the Act, which are now, and at all times material herein, have been employers engaged in commerce and businesses affecting commerce within the meaning of Section 2(6) and (7) of the Act. Respondent's answer failed to deny the truth of the allegations.

Accordingly, I find and conclude that Respondent is now, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

Respondent's answer fails to deny this allegation and I accordingly find it to be true.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

(1) The complaint herein alleges that Respondent engaged in collective bargaining with the Union in February 1980 and reached agreement on "substantially all terms and conditions" of a contract, and, more specifically, that (1) waiters and waitresses would be given the option of taking their meals at Respondent's premises during their working day or, to receive \$2 per day in

lieu of meals, and (2) wages would be annually increased pursuant to a formula based on the increase in the cost of living up to an 8-percent (annual) limit. Finally, the complaint alleges that on or about March 5, 1980, Respondent repudiated such agreements on grounds that, among other things, its negotiator lacked authority to bind Respondent in these respects.

Throughout this proceeding the Union sought to introduce evidence or to argue that the parties to the negotiations reached a complete agreement on February 29, 1980, and that the terms of that agreement are sufficiently well defined by competent evidence to enable me to order Respondent to sign it, under the apparent theory that proof of agreement upon "substantially all" terms is sufficient to satisfy the test of H. J. Heinz v. N.L.R.B., 311 U.S. 514 (1941), wherein it was held that an employer violates Section 8(a)(5) of the Act by refusing to sign an agreed-upon contract.

However, even if the theory were valid, it would not be of help to the Union in this case. As previously noted, it is not alleged in this case that all terms of a collective-bargaining agreement were agreed upon, but only that "substantially all" such terms were agreed. Moreover, counsel for the General Counsel announced at the hearing that, "At no time does the General Counsel contend that this entire document³ was a final and binding [contract] on the parties."

To the contrary the Union's contention in this case that Respondent failed to sign an agreed-upon contract was the subject of a partial dismissal by the Regional Director on October 31, 1980. The Union's appeal to the General Counsel of the National Labor Relations Board was denied on February 17, 1981.

Additionally, it was acknowledged by counsel for the Union during the hearing herein that the Union has filed still another unfair labor practice charge against Respondent, asserting that Respondent has failed or refused to sign an agreed-upon collective-bargaining agreement. As stated in the brief filed by the Union:

. . . since a subsequently filed charge (Case 31-CA-11507) not now before this Honorable Judge remains pending investigation and consideration by the General Counsel, the General Counsel's representative was obliged, at the hearing, to disavow any intent to urge that a document [G.C. Exh. 7] "prepare[d] and present[ed] to the Employer for signature" subsequent to the date of the General Counsel's comment on appeal from partial dismissal of the Heinz theory allegation of this charge, and sent to the Respondents for signature in August 1981 constitutes the final agreement reached by the parties in February 1980.

Under the circumstances there can be no doubt that I am precluded from deciding the question of whether or not a complete agreement was reached by the parties to these negotiations. It is well settled that the General

Respondent's motion to reopen the record for the limited purpose of receiving into evidence certain documents inadvertently omitted was granted, without opposition from the General Counsel or Respondent.

² Referring to G.C. Exh. 7, the document prepared by the Union's attorney, Silver, in August 1981 and thereafter presented to Respondent with a demand that it be signed.

Counsel (and, derivatively, the Regional Director) has exclusive authority under Section 3(d) of the Act to investigate, issue, and prosecute complaints, and, as a consequence, to control the theory under which complaints are prosecuted. See, e.g., International Brotherhood of Electrical Workers, Local Union 903 (Hinton Commercial Contractors, Inc.), 230 NLRB 1017 (1977), and Winn Dixie Stores, Inc. v. N.L.R.B., 567 F.2d 1343 (5th Cir. 1978).

The Union's argument that it is merely asserting a theory contained within the General Counsel's wording of the complaint is at variance with its continued assertion in another case of the precise point previously dismissed by the Regional Director, and sustained on appeal by the General Counsel.

Accordingly, I conclude that the issue before me is limited to the question of whether or not Respondent violated Section 8(a)(5) of the Act by repudiating the two tentative agreements referred to in the complaint.

(2) However, I also find and conclude that I am not precluded, as urged by Respondent, from deciding even this narrow question. Respondent's argument is to the effect that the complaint should be dismissed because of unwarranted delay in its prosecution, which has worked to the prejudice of Respondent.

Respondent has failed, however, to indicate the manner in which it has been prejudiced, aside from generalized argument. And, in view of the fact that a great deal of the "delay" in this case appears to have resulted from administrative actions by the Regional Office and the Office of the General Counsel which dramatically reduced the amount of evidence and issues to be heard against Respondent in this case, it seems unlikely that Respondent could have persuasively argued the point.

Additionally, it has been held that the doctrine of laches has no application to cases brought before the Board, an agency of the United States Government engaged in the exercise of public or governmental functions. See W.C. Nabors d/b/a W.C. Nabors Company, 134 NLRB 1078, fn. 3 (1961); Arteraft Upholstering Company, Inc., 228 NLRB 462 (1977).

I conclude that Respondent's motion to dismiss the complaint should be, and it hereby is, denied.

B. Background

For some years the Union has represented employees in certain of the restaurants operated by Merrell M. Williams 4

The most recent collective-bargaining agreement between the parties extended from April 1, 1975, to March 31, 1980.

During the term of this collective-bargaining agreement, a dispute arose between Respondent and the Union as to whether or not California law permitted Respondent to claim credit against the wages owed employees for the value of meals eaten by the employees during the

course of their employment. The dispute led to arbitration, as well as lawsuits filed by both the Union and the State of California against Respondent. These lawsuits were still pending in February 1980.

In early February 1980, Respondent and the Union exchanged correspondence advising one another of their intent to engage in negotiations toward a new collective-bargaining agreement to supplant that which was about to expire. Pursuant to this exchange of letters, as confirmed by telephone conversations between the attorneys for the Union and Respondent, negotiating sessions were scheduled for February 28 and 29, 1980.

C. The Negotiations

On February 28, 1980, the Union met to negotiate with Respondent at the offices of Respondent's attorneys, Clark and Tomigal. Both Clark and Tomigal were in attendance on behalf of Respondent. The Union was represented by its attorney, Silver, its secretary-treasurer, Ted Zenich, and an official of its International affiliate, Paul Meister. Soon after the meeting's outset Clark announced that, while he and Tomigal were generally authorized to negotiate and conclude an agreement with the Union on Respondent's behalf, there were certain items which would require the specific authorization of Respondent. He advised the Union that he would notify it in appropriate instances and seek additional authority if required to reach an agreement. He assured the Union that arrangements had been made to enable him to reach his client by phone.

As mentioned, the parties to the negotiations had previously exchanged their proposals⁵ for a new collective-bargaining agreement. The Union requested that Respondent make a proposal on "economics," noting its disagreement with Respondent's position that such matters be reserved for discussion until tentative agreements had been reached on "non-economic" matters. Clark obliged, offering a wage increase of 6 percent for a 3-year contract. The parties then went through a point-by-point review and explanation of the Union's proposals and Respondent's proposals.

The meeting was adjourned after approximately 5 hours, but its participants then repaired to a bar located in the same building, and informal conversation continued between them. One subject of such conversation was the possibility that their chances of reaching an agreement might be enhanced if the Union were to drop its lawsuit against Respondent.⁶

The parties resumed their negotiations late in the following morning, at the same location and with the same persons present, except for Meister. The point-by-point discussion of proposals continued, based in part upon in-

⁴ The complaint alleges, and Respondent's answer fails to deny, it at the restaurants in question the unit may be described as follows:

All chefs, dinner cooks, second cooks, barbecue or broiler cooks, fry cooks, cook's assistants, pantrymen or women, bakers, waiters, waitersses, dishwashers, janitors, yardmen, carhops, cashier-hostesses, busboys, busgirls, bartenders, cocktail waitresses, and bar boys.

^a It is undisputed that Clark reiterated what had been set forth on Respondent's written proposal, that it reserved the right to add to, delete, or modify any proposals at any time prior to the reaching of a complete agreement. Indeed, the Union announced similar reservations, and added that ratification by its membership would be necessary in order to have a collective-bargaining agreement.

⁶ The Union's proffer of evidence concerning its reasons for agreeing, on the following day, that its lawsuit(s) would be dismissed was rejected. It suffices that the agreement was made, for whatever reason, and that each party make concessions in an effort to reach total agreement.

formation and authority Clark had been given when he telephoned Respondent's business offices that morning, before the beginning of the day's negotiations. Each side modified previously stated positions and, as on the first day of negotiations, reached tentative agreements.

Sometime after a break for lunch, Silver began a recital of a series of proposals which the Union deemed essential to a complete accord. According to Silver he was interrupted by Clark, who broached the possibility of reaching a "package" agreement. Clark stated that he could not make such a proposal unless he secured further authorization from his client, Respondent, but went on to say that he would be willing to contact the client if the Union would first indicate its willingness to agree to such a package. The Union announced its agreement, whereupon Clark left the negotiating table to telephone his client.

Clark again called Respondent's offices and spoke to Hall. Once again I credit his testimony that he mistakenly assumed that Hall had Williams with him, that the information conveyed to Hall was being relayed to Williams, and that Williams had knowledge of and approved the authorizations given him by Hall. Thus, after speaking to Hall for approximately one-half hour, Clark returned to the bargaining table.

Upon his return Clark recapitulated the terms of Respondent's package offer and advised the Union's negotiators that he had authority to make such an offer. The Union's negotiators accepted. Silver agreed to prepare the document memorializing the collective-bargaining agreement which had apparently been reached.⁸

D. The Withdrawal From Tentative Agreements

Following the conclusion of the meeting of February 29 Clark telephoned Respondent's offices. This time, however, he spoke to Williams, rather than Hall. When Clark told Williams of the agreements he had reached with the Union, Williams told him that he (Clark) had no authority to make the proposals concerning either meal credits or cost-of-living wage increases. At that point in their conversation it became clear to Clark that he had been incorrect in his assumptions earlier that day that Williams had been with Hall at the times that Clark spoke with Hall about the negotiations and the extent of his (Clark's) authority. Clark and Williams concluded their conversation with the understanding that Williams would consider his position and "get back" to Clark.

It was not until March 5, 1980, that Clark heard from Williams. And the message was that Williams would not abide by the agreements regarding meal credits or cost-of-living raises.

Clark telephoned Silver that same evening, advising him of Williams' position. Clark offered to resume negotiations and explained the circumstances leading to his "embarrasment"; i.e., his assumptions regarding the whereabouts of Hall and/or Williams.

Several days later Clark telephoned Silver again. He offered to again explain to Silver what had happened, even going so far as to offer to allow Silver to taperecord their conversation. Additionally, he offered to allow the Union to examine Respondent's books.

Instead, the Union's membership ratified the agreement on March 17, and thereafter Silver sent Clark a letter advising that the Union expected Respondent to execute their collective-bargaining agreement.¹¹

While the record is uncertain as to the exact date when the Union took action which resulted in the dismissal with prejudice of its own and the State's lawsuits against Respondent, it is crystal clear that the Union had been informed of Respondent's repudiation well before it took whatever actions resulted in the dismissals.

E. Conclusion

Under any view of the evidence in this case no one can doubt that, at the least, the parties to the negotiations believed that they had reached the sort of agreement which the Board has characterized as "a contract to make a contract." Summer Home for the Aged, 226 NLRB 976, 977, fn. 5 (1977), enforcement denied 599 F.2d 762 (6th Cir. 1969), on record 249 NLRB 737 (1980). Certainly Respondent has made no attempt to deny that it reached such an agreement with the Union. Nor does Respondent's evidence even tend to dispute the contention of the General Counsel and the Union that it later reneged upon its agreements. Finally, there appears to be no dispute that among those agreements were two calling for: (a) employees to receive a meal credit of \$2 per day in lieu of meals, and (b) employees to receive a cost-of-living increase during each of the 3 years of a proposed agreement, up to an upper limit of 8 percent

From all this I conclude that Respondent's repudiation of its "contract to make a contract" must be held to be violative of Section 8(a)(5) of the Act.

By all that appears, Clark was vested with authority sufficient to satisfy the law's requirements. The Act does not require that the person conducting the negotiations have absolute authority to bind in each and every instance, but only that the degree of authority be sufficiently broad to permit negotiations to proceed without undue delay. And, in instances such as this, where additional authority on specific subjects is sought, it suffices

⁷ Clark spoke by phone with Respondent's controller, Hall. Clark testified, and I credit him in such testimony, that he mistakenly assumed that Hall was accompanied by Merrell Williams throughout this telephone conversation.

^a As noted earlier, Silver did not, however, prepare and present the document for signature by Respondent for another 1-1/2 years in August 1981.

⁹ Clark made no mention of any problem with the agreement during an intervening phone conversation with Silver, on either March 3 or 4, 1980.

While Clark's affidavit fails to mention the cost-of-living raises as "sticking points" with Williams, I find that Clark's testimony at the hearing was credible. In any event, Silver's own testimony was to the effect that Clark mentioned the cost-of-living raises as an impediment to agreement when he called on the evening of March 5.

¹¹ The Union, however, excuses its failure to present a document to Respondent for execution for another 1-1/2 years by labeling any such presentation as a futility.

if arrangements have been made to allow it to be obtained with reasonable promptness.

Here Respondent's violation does not stem from any defect in its grant of authority to Clark. It results from its repudiation of tentative agreements explicitly and admittedly authorized by Hall, an officer of Respondent cloaked with ostensible authority to reach agreement.

I cannot find Respondent's failure to make sure it had clear channels of communication between itself and its negotiator to be consistent with the duty to bargain in good faith.

THE REMEDY

The Charging Party urges that I do more than order that Respondent cease and desist its unlawful conduct. I find its arguments unpersuasive, however.

As shown earlier herein, I am precluded from examining or deciding the question of whether or not a complete agreement was, in fact, reached between the parties. But I cannot avoid commenting that, while many tentative agreements were obviously reached by the parties, many of their exact details have never been clear to me. Even as to the two specific proposals which are the subject of this case I am unable to determine the exact language in which they would have been written had no repudiation occurred. Moreover, it seems unnecessary to the resolution of this case that their exact language be determined. Not only is such language subject to change in further bargaining, but it will clearly be among the primary subjects of litigation should a complaint be issued in the charge now pending investigation.

Nor do I find any warrant or authority for ordering Respondent to implement, retroactively or otherwise, the provisions of its tentative agreements on meal credits and cost-of-living raises.

CONCLUSIONS OF LAW

- 1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its tentative agreements upon the subjects of meal credits and cost-of-living increases in wages.
- 4. Said unfair labor practices have affected and, unless permanently restrained and enjoined, will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER12

The Respondent, Merrell M. Williams; Boy's Restaurant, Inc.; Girl's Restaurant; Jumbo's d/b/a Farm Boy Restaurant; and Farm Boy Restaurants Nos. 2 and 3,

Santa Maria, Arroyo Grande, Pismo Beach, and San Luis Obispo, California, its officers, agents, successors, and assigns. shall:

- 1. Cease and desist from:
- (a) Failing and refusing to bargain in good faith with Hotel Employees and Restaurant Employees International Union, Local 703, AFL-CIO, as the exclusive bargaining representative of its employees in the unit described below by repudiating or withdrawing from previously accepted proposals for terms and conditions for employment. The appropriate bargaining unit consists of:

All chefs, dinner cooks, second cooks, barbecue or broiler cooks, fry cooks, cook's assistants, pantrymen or women, bakers, waiters, waitresses, dishwashers, janitors, yardmen, carhops, cashier-hostesses, busboys, busgirls, bartenders, cocktail waitresses, and bar boys, at Respondent's restaurants in Santa Maria, Arroyo Grande, Pismo Beach, and San Luis Obispo, California.

- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action which is necessary to effectuate the policies of the Act.
- (a) Upon request bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the abovenamed Union, as the exclusive representative of its employees in said unit, and embody in a signed agreement any understanding reached.
- (b) Post at its facilities referred to above, copies of the attached notice marked "Appendix." Copies of said notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices ae not altered, defaced, or covered by any other material.
- (c) Notify the Regional Director for Region 31, in writing, within 20 days from the date of this Decision, what steps Respondent has taken to comply herewith.

¹² All outstanding motions inconsistent with this recommended Order are hereby denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

¹³ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."